Office-Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 107

ERNEST KREHER, MAX KREHER, PAUL KREHER, TRUSTEES OF TAMPA SHIPBUILDING & ENGINEERING COMPANY, A DISSOLVED CORPORATION,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE COURT OF CLAIMS

The petitioners respectfully show to the Court, as follows:

Summary and Statement of Matter Involved

1. This matter involves the sum of $2,078,000.00, with interest, which petitioners claimed in a petition heretofore filed in the Court of Claims, growing out of the taking and confiscation by the United States Government for its own use and benefit in 1940 of the Tampa Shipbuilding & Engineering Company, a corporation, which was a shipyard with extensive land, buildings, dry-dock, machinery and equipment acquired over a period of forty years, and built to the pinnacle of one of the largest shipyards on the East Coast

of the United States by the three aforementioned petitioners, who became its trustees after the aforesaid taking by the United States. During World War I, Tampa Shipbuilding and Engineering Company held the highest rating for construction of steel ships in the United States. The defendant below, the United States, in November 1940 took over and confiscated the shipyard in direct disregard and violation of the Fifth Amendment of the Constitution of the United States, taking same without due process of law and without any compensation. The taking by the Government was accomplished by allowing and directing its representatives, trustee and employees, who paid neither a cent nor invested a nickel therein, to organize and operate for the benefit of the United States a corporation known as the Tampa Shipbuilding Company, a corporation. The president of this new corporation was one George B. Howell, who was for years immediately prior thereto a trustee for the Government acting as trust officer for the Exchange National Bank, Tampa, Florida, the said bank acting as such for the Government in the matter of loans made to the Tampa Shipbuilding & Engineering Company by the PWA and the Reconstruction Finance Corporation. Mr. Howell put up $500.00 for the Government in order for the new corporation to qualify under the Florida statutes and was later reimbursed therefor. The vice president was one P. B. Brili, who was an *employee* of the United States Maritime Commission and had been placed as general manager of the Tampa Shipbuilding & Engineering Company by the Maritime Commission at its direction when there was no necessity for such placement and over the protest of Ernest Kreher, president of the Tampa Shipbuilding & Engineering Company. The secretary and treasurer was J. W. Gray, who had been placed by the Government in both companies; and the assistant secretary and treasurer was one

B. C. Stafford, who had immediately prior thereto been an employee of the Reconstruction Finance Corporation and who was given this office in the Tampa Shipbuilding Company by the Government to look after the interests of the Reconstruction Finance Corporation under its loans to the Tampa Shipbuilding & Engineering Company and the Tampa Shipbuilding Company.

2. The main purpose for the taking of the said shipyard by the United States was the need of the United States Navy in having a shipyard in Tampa, Florida, and particularly the Navy wanted the dry-dock of the Tampa Shipbuilding and Engineering Company. Immediately upon the organizing of the Tampa Shipbuilding Company by the United States, its branch, the United States Navy, dealt with it exclusively until 1945 when the war was over, having completed contracts for the Navy during that period totaling $193,000,000.

3. It was admitted by the Assistant General Counsel for the United States Maritime Commission, who was one of the authors of the plan by which the Government took the shipyard, and who handled the incorporation of the new company, that the Tampa Shipbuilding & Engineering Company would have been reimbursed for the taking, had the Government then had the powers it later derived under the War Powers Act under which the shipyard would have been confiscated and just compensation paid, but not having such powers no arrangement for compensation was made.

4. The events leading up to the taking of the shipyard by the Government grew out of certain ship contracts let by the U. S. Maritime Commission to the Tampa Shipbuilding and Engineering Company. Under date of May 21, 1938 the United States Government, acting through the

Maritime Commission, entered into four contracts with the engineering company for the construction of four C-2 vessels, known as Hull Nos. 33, 34, 35, and 36, respectively, the contract price for each vessel being approximately $1,180,000. Also, on October 25, 1939, the United States through the Maritime Commission entered into four additional contracts with said company for the construction of four C-2 vessels, known as Hulls Nos. 37, 38, 39, and 40, respectively, at a contract price for each vessel of approximately $1,950,000. At the very outset of the performance of the first four contracts, the Maritime Commission insisted that the contracting company place men from the Maritime Commission in charge as general superintendent, hull superintendent, and machinery superintendent of the shipbuilding company. The president of the company, Mr. Ernest W. Kreher, who had headed the company for forty years as an engineer in building ships, protested such action without avail and finally agreed thereto. Thus practically an entirely new management of the plant (Government management) took charge of the operations and performance of said contracts from January 23, 1939. On December 20, 1939, the Maritime Commission notified the company that it was not satisfied with the management of the plant, which in fact the Government managed, and that a Mr. P. B. Brill from its office would be named general manager of the company at $10,000.00 a year and after having made all the arrangements, suggested to the company that it go through the form of hiring him. Mr. Kreher, who had been general manager in name only after the aforesaid Government management took over, again protested such action without avail, and Mr. Brill was placed in complete charge of the plant as general manager. Mr. Kreher was then president of the company in name only, having no say as to the performance of said contracts. By the

fall of 1940, the aforesaid management had placed the company in debt, financial difficulties, and completed Hull # 33 at a loss of $320,000.00. However, no liens were filed against the vessels, nor were any suits filed against the company. The Government also claimed the company was in default in performance of the contracts and that it was insolvent. This position was taken by the Government after it had managed the shipyard for a year and half.

5. The Government next wrote up a plan of reorganization of the company, dated October 29, 1940, and organized the Tampa Shipbuilding Company, Inc., as heretofore mentioned. In addition to the Navy acquiring the shipyard and the drydock, it acquired under this plan Hulls 34 to 40 for conversion into naval auxiliaries and immediately paid the new company higher prices for Hulls 34, 35 and 36. There was no evidence by the Government as to why these higher prices were not paid to the old company. The new corporation took over all the assets and liabilities of the old corporation, and was to all intents and purposes the same as the old corporation, no new capital having been put up except the said $500.00. Under this plan the Government forced each stockholder of the old company to give up two shares of stock in the old for 1 share in the new company. The president of the old company, Mr. Ernest W. Kreher, protested and opposed the plan of reorganization, but yielded under threats from the Government officials, stating that the Government was too big for him to fight. The new corporation, under said plan of reorganization, had a capitalization of 10,000 shares of no par value common stock. Stockholders of the old company received 3600 shares thereof, same being nonvoting stock, termed "Class A". The remaining 6400 shares the Government had issued to its agents and employees, as follows: Howell, 4900 shares; Gray, 750 shares; and Brill, 750 shares. This stock was

voting stock and termed "Class B" stock. The Government gave these men the Class B Stock for acting as its representatives in taking over the shipyard for the use and benefit of the Navy, as aforesaid. Howell, under the Government plan, was to hold the stock in trust until the amount owed the Government in loans had been paid off, at which time, he, Brill, and Gray owned it outright. The former officials of the old company against which there was no evidence of inefficiency or misconduct, were denied offices in the new company, as the Government wanted no interference by them, preferring to have its representatives manage the new company. In 1945 when World War II was over and the Navy had no further use for the shipyard the stockholders holding the Class A Stock sold their 3600 shares at $100.00 a share, which was the amount it cost them, and which represented the value of the stock immediately prior to the reorganization by the Government. The Stockholders consequently lost $355,300.00, as a direct result of the taking by the Government of the property of the old company and forcing them to take one share for two, as aforesaid. The capital stock in the old company amounted to $715,300.00. The Class B stockholders sold their shares at $200.00 per share, realizing $1,280,000 as a gift from the Government and for which stock they had paid nothing, as aforesaid. Also the class B stockholders received dividends totaling $76,800.00. The amount represented by the latter figure reflects additional property taken away from the old company by the Government.

On the two series of Government contracts entered into with the Government by the old company, the Government in taking over the old company, showed a profit of $423,-031.52 in completing same, which the Government pocketed and failed to credit in favor of the old company.

6. The assets of the old company according to its books amounted to $2,977,340.12 and the liabilities $2,020,061.18. The assets at the time of the taking exceeded its liabilities in the sum of $957,278.94. These figures do not include the equity values in the Hulls, nor the indebtedness thereon. Suffice it to say, however, that when completed, the contracts on Hulls 34-40 showed a profit of $423,031.52, as aforesaid. The court below should have awarded judgment for $957,278.94, plus the profits realized on the said Hulls, as aforesaid; or in the alternative should have rendered judgment for said $1,280,000.00 taken away from the old stockholders by the Government, which amount of stock represented the value of the property, in part, after the Navy had completed its ship contracts and World War II came to an end.

Statute Involved

The statute involved is the Fifth Amendment to the Constitution of the United States, reading in part as follows:

> "No person shall • • • be deprived of life, liberty, or property, *without due process of law;* nor shall *private property be taken for public use, without just compensation.* (Italics supplied)

Questions Presented

1. Did the defendant have the right to demand that the shipbuilding company be managed by its own personnel in the performance of said contracts?

2. Was the defendant legally entitled to draw up a plan of reorganization of the company?

3. Did the interference by the defendant with the performance of the contracts, work to the detriment of the contracting company?

4. Was the defendant justified in reorganizing the company because of alleged insolvency and inability of the company to pay its debts? Was that the function and right of the defendant, or was it a scheme of defendant to take over the shipyard for the exclusive use of the Navy?

5. Isn't the fact that the defendant reorganized the company, and not its officers and stockholders, conclusive that the Government took the shipyard and operated same for its own benefit in the name of the Tampa Shipbuilding Company, Inc.?

6. Isn't the fact that the officials of the new company were all representatives of the Government, conclusive that the Government wanted exclusive use of the yard?

7. Why should the defendant take steps to reorganize a company, rather than terminate the contracts because of default and foreclose on its mortgages for money lent to the company, which latter action was all it was legally entitled to do?

8. Why should the defendant allow its representatives to receive 6400 shares of stock of the new company without investing a nickel in the new company or paying for the stock, save and except to have its men carry out its avowed purpose to take over the plant and operate same for the use of the Navy?

9. Why should the stockholders of the contracting company be stripped of their stock holdings to the extent of one-half and have no voice in voting their stock in the new company, save and except that the defendant wanted no interference by them in its use of the company for the benefit of the Navy?

10. Why should the ultimate profits on the performance of the ship contracts, which were realized by using the plant

and equipment of the contracting company, be pocketed by the defendant, having already taken away one-half of said stock?

11. The record below showing that the defendant lost nothing on the ship contracts and all its loans being paid in full, why should the Government be allowed to retain the item of $957,278.94 being the amount of assets over liabilities taken by it, as aforesaid?

12. The record below admitting that the Government saved itself millions of dollars by taking over the Tampa Shipyard, should it not be required to reimburse the company the above items, because of taking and using its shipyard, as aforesaid?

Reasons Relied On for Allowance of the Writ

The writ should issue for the following reasons:

1. The lower court erred in holding that the defendant was excused from liability on its contracts and taking away the stock and assets, as aforesaid, because Howell had been an official of the Tampa Chamber of Commerce and was interested in the well-being of the city of Tampa in establishing a large shipyard there; rather than holding that Howell was in fact at all times acting as trustee for the Government, and acted as such in having all loans made by the Reconstruction Finance Corporation paid off in full, principal and interest. The evidence is that Howell was trust officer of the Exchange National Bank of Tampa, Fla., the designated trustee in the R.F.C. loans. Howell gave up his position with the bank at the request of the Maritime Commission. (See Goertner testimony pp. 61, 62, Deft's Ex. D, Record below.) Where private property is taken for public use by agents of the United States, the Government is under implied obligation to make just com-

pensation therefor. *Phelps* v. *United States,* 47 Sup. Ct. Rep. 611; 274 U. S. 341.

2. The lower court erred in holding as a fact, and stating in its opinion, that the Plan of Reorganization was proposed by Howell. The Plan was in the form of a letter, dated October 29, 1940, from which the lower court quoted at length in its special findings of fact No. 27. Testimony was offered by the defendant in the court below, and received in evidence, as shown by pp. 140 and 141, Defendant's Ex. D., Tr. Rec. below, that the said letter of October 29, 1940, mentioned in said findings No. 27, was prepared by Mr. Anderson, Director of Finance, Maritime Commission; Mr. Farbach, Chief Counsel of the Commission, and Mr. Stafford of the Reconstruction Finance Corporation, who later was named Asst. Secretary and Asst. Treasurer of the corporation organized by the Government; also Mr. Goertner of the Maritime Commission, who was its Assistant General Counsel. Page 7 of said letter was *rewritten by Mr. Anderson* in his office at the Maritime Commission on Saturday, October 30, 1940, after the Commission had approved same, as it did not want to be in position of approving stock transactions and requested that par. 19 be eliminated from letter of October 29, 1940. (Italics supplied.)

Mr. Howell testified under oath at the Hearings before the Committee on the Merchant Marine and Fisheries (Deft's Ex. D, below), at page 140, as follows:

> "On page 13 of the report it states that I proposed the reorganization. As stated elsewhere in this report, I had nothing whatever to do with formulating the plan of reorganization. I became a party to it at the insistence of the Commission and the Reconstruction Finance Corporation."

In spite of this admission of fact by the Government's own witness in the court below, the court held as a fact that Howell proposed the Plan, which is highly prejudicial to plaintiffs' case, because if the defendant proposed it, the Government is liable for all consequential damages growing out of said taking.

Howell's letter to the Comptroller General, dated October 12, 1942, quoted in part, at the bottom of page 164, Deft's Ex. D, reads as follows:

> "The actual facts of the case not only disprove all the allegations, inferences, and suggestions of wrongdoing, but establish conclusively that the transactions complained of were conceived by the United States Maritime Commission and the Navy Department, to meet ship emergencies and necessities then confronting the Federal Government in its war program and that the Tampa Shipbuilding Co., Inc., the Tampa Shipbuilding & Engineering Co., and myself were merely agencies through which the transactions conceived by the Commission and the Navy Department *for their own purposes and benefits* were carried out; that the transactions did adequately and promptly meet the emergencies and necessities of the Government and that no present benefit, financial or otherwise, inured to me, the Tampa Shipbuilding & Engineering Co., or the Tampa Shipbuilding Co., Inc." (Italics supplied.)

There can be no better admission on the part of the defendant, than the above quoted testimony in the court below, proving that the defendant took the profits of the said ship contracts; the stock of the old company, and the entire plant, equipment, dry dock, and real estate of the contracting company, for its own purposes and benefits. (See *Yearsley* v. *W. A. Ross Construction Co.*, 60 Sup. Ct. Rep. 413; 309 U. S. 18.) Yet the court below refused to find this testimony as facts, contending that nothing was taken from the old company within the meaning of the Fifth

Amendment. The ignoring of these facts was prejudicial to plaintiffs' case, and unjust. The court held that the plan of re-organization was unanimously approved by the stockholders of the old company. The defendant having managed its affairs for a period of a year and a half prior thereto and being in full control of the yard, there was nothing left for the stockholders to do than to go through the form of approving the Government's plan to take the yard, because as shown by the evidence, the defendant would have taken it anyway. Also, in approving this plan, as aforesaid, the stockholders did not know that the Navy would immediately pay to the Government's company $900,000.33 for the incompleted hulls, as described below.

Whenever the United States seizes private property there is an implied obligation to pay for it.

The contracts were property within the meaning of the Fifth Amendment and as they were taken for public use the Government is liable. It was so held by this court in *Omnia Commercial Co. Inc.* v. *United States,* 43 Sup. Ct. Rep. 437; 261 U. S. 502.

If the property so taken by the Defendant is not paid for, the burden falls upon the stockholders, whose property was taken, as aforesaid, and not upon the public, for whose benefit the shipyard was taken over for use of the Navy. Payment should be made to prevent inequality. See *Michigan Cent. R. Co.* v. *Slack,* 17 Fed. Cas. No. 9527a, affirmed in *Railroad Co.* v. *Collector,* 100 U. S. 595.

The lower court failed to apply the principles laid down by this court in the aforementioned cases. We also cite as authorities for granting the writ, the following cases, viz: *U. S.* v. *Miller,* 63 Sup. Ct. 276, 317 U. S. 369. *U. S.* v. *Lynah,* 23 Sup. Ct. 349; 188 U. S. 471.

3. The lower court erred in holding that the stockholders of the old company were fortunate in having the new cor-

poration take over the assets of the old company in consideration of the assumption of its obligations and liabilities, when as a matter of fact the new corporation had the same assets and liabilities as the old company. The only change was its exclusive management by the Government's representatives in behalf of the Navy, together with change of name. No third parties invested new capital; nor purchased stock in the new company. It was in fact no re-organization, but a complete taking over by the Government.

4. The lower court erred in holding that the defendant acquired no benefit from the sale to the new company, except indirect benefit of having the ships completed free of claims without the expense and delay incident to bankruptcy, receivership, or foreclosure proceedings. This is entirely contra to the evidence offered by the Government itself in the court below. See Deft's Ex. D, at page 57, where it is stated that the hulls that were taken over and converted to Navy use in their incompleted state, saved the Navy, "probably upwards of a million dollars a vessel," because the Navy did not have to take completed vessels in another yard and convert them to its uses. The court below refused to find this admitted evidence as a fact, all to the prejudice of plaintiffs.

5. The court erred in holding that nothing was taken within the meaning of the Fifth Amendment from the old company. As shown by defendant's own testimony, the Navy paid the new company $5,513,248.00 on or about November 12, 1940, for the incompleted Hulls Nos. 34, 35, and 36, out of which the Maritime Commission was immediately paid $4,613,247.67 for moneys advanced by it on the aforesaid contracts covering Hulls 34, 35, and 36, leaving $900,000.33 additional capital in the immediate possession of the new company. This payment by the Navy was about

7 days after the defendant had incorporated the new company. The defendant has not, and cannot explain why this transaction and payment was not made to the old company, which had in fact constructed these vessels to the aforementioned state of completion, the new company having furnished no labor or material thereon, nor advanced any money. The inescapable conclusion is that the defendant was determined to freeze out the old management and stockholders and get full use and control thereof through its representatives, Howell, Brill, and Stafford. If this were not so, why didn't the Navy pay the old company $5,513,248.00, deducting therefrom $4,613,247.67 for the Maritime Commission, which payment certainly would have removed any fear of bankruptcy, receivership, or foreclosure upon the part of the Government, if any it had.

6. As further evidence the defendant took the shipyard for the use of the Navy, we quote the following from said Deft's Ex. D, at pp. 83, 84, record below:

> "Mr. Culkin: And your group, your division of the Navy, was influenced by the need for this plant?
>
> Captain Gokey: Yes sir; especially as far as the repair facilities were concerned
>
> Mr. Culkin: Yes; that was a needed thing and a continuing proposition.
>
> Captain Gokey: Yes Sir.
>
> Mr. Culkin: That is, assuming you do not get control of the submarines?
>
> Captain Gokey: They had a dry dock there to start with, and some repair facilities.
>
> Mr. Culkin: Did the Government build the dry dock facilities?
>
> Captain Gokey: That was done under a P.W.A. loan, I think.
>
> Mr. Culkin: That will take in the largest ship, I assume?

Captain Gokey: No; not the largest sized ship, but a fair sized ship. I would say, maybe a cruiser, up to the size of a cruiser.

Mr. Culkin: But it was a necessary, logical allocation in the judgment of your group?

Captain Gokey: Yes sir.

Mr. Culkin: Necessary for this type of development, and I assume that is what influenced your choice?

Captain Gokey: Very definitely."

From the above testimony, the lower court refused to find as a fact that the shipyard was taken by the defendant for the Navy, even though it was uncontradicted and offered in evidence by the defendant below. The failure to find same as a fact was grossly erroneous, prejudicial to plaintiffs' case, and conclusive evidence that the plan of reorganization was not proposed by Howell because of friendship for the Krehers and as a public spirited citizen for the well being of the city of Tampa, and its Chamber of Commerce, as the court held. As of December 10, 1942, the Maritime Commission could have put Howell out of office any time they wanted to, as testified by him on that date at the Hearings before the Committee (Deft's Ex. D, page 115). Howell, therefore, was working for the Government, and not as president of a private corporation.

7. The court erred in denying plaintiffs' motion for a new trial, which was based in large part upon the request that the court amend its findings of fact, and make the additional findings of fact as mentioned above. Substantial testimony in favor of plaintiffs, most of which having been offered by the defendant was totally disregarded by the court below, as has already been fully outlined, supra. Unless the writ is granted, such action of the court will remain uncorrected.

8. Further, the court erred in holding that the case should be dismissed for lack of authority in three of the six trus-

tees to prosecute the suit below under the Florida statutes. The suit was brought by Ernest Kreher, Max Kreher, and Paul Kreher, who owned 4580 shares of stock of the 6700 shares of stock outstanding on the books of the company at the time of the taking of the company by the defendant. In addition they were a majority of the trustees of the dissolved corporation. These plaintiffs could not have joined the trustees, Phillips and Gray, because Phillips was, and still is, United States Attorney in Tampa, and Gray realized $150,000.00 as a gift from the Government, as aforesaid. The remaining trustee, Standfuss, testified in favor of plaintiffs, and had no objection to the suit being filed. We submit that the case below was properly brought under the provisions of Sec. 610.18, 1941 Florida Statutes. As this was a matter of defense raised by the defendant, counsel for plaintiffs moved at the argument below for permission to amend the caption in order to cover any technical defects, which should have been granted by the court. However, the court held no recovery could be had on the merits.

It is, therefore, respectfully requested that the writ should issue in the case at bar, in order that equity and justice may be done.

Respectfully submitted,

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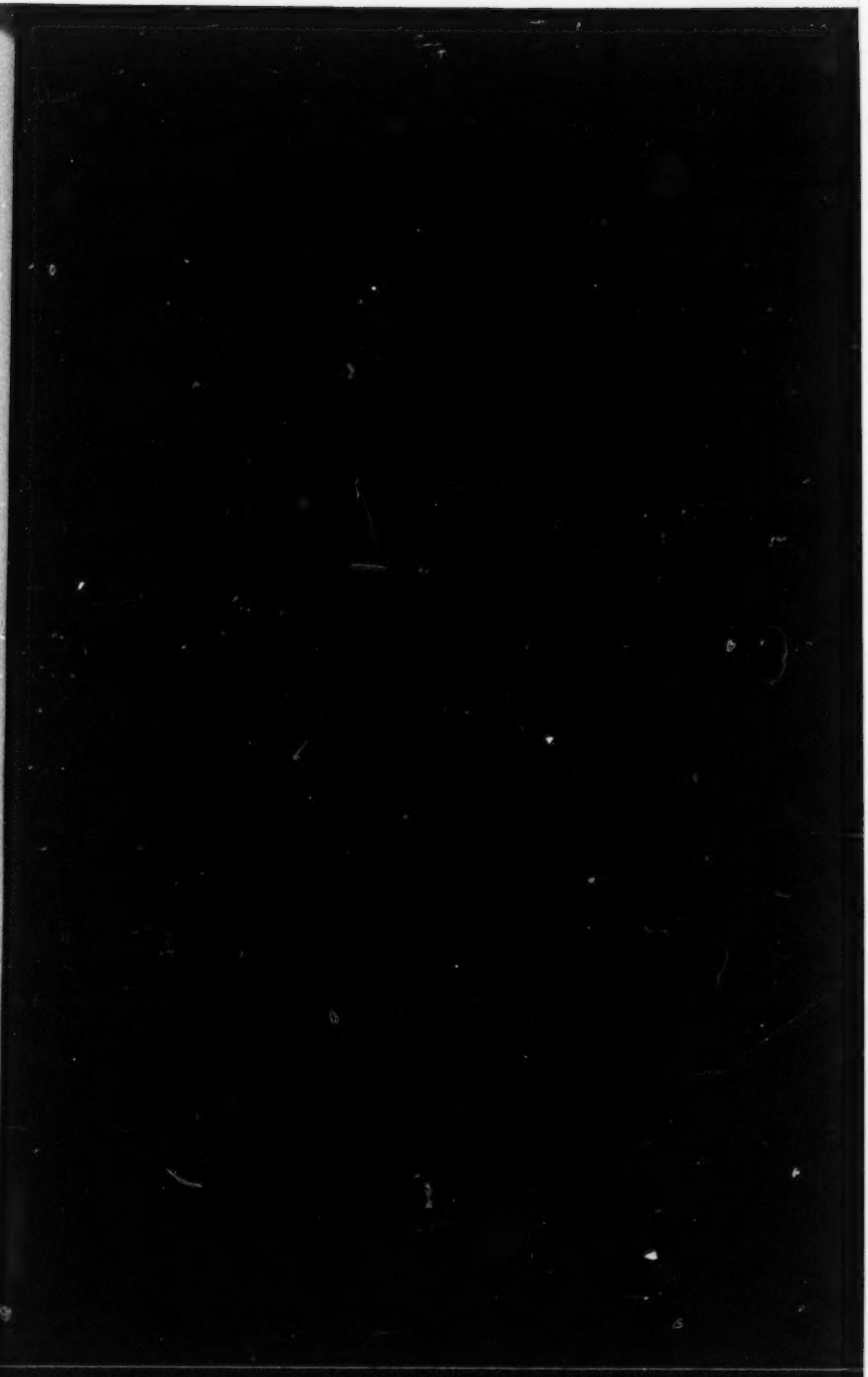

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 107

ERNEST KREHER, MAX KREHER, PAUL KREHER, TRUSTEES OF TAMPA SHIPBUILDING AND ENGINEERING COMPANY, A DISSOLVED CORPORATION, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 33-46) is reported at 87 F. Supp. 881.

JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1950 (R. 46). A motion for a new trial was denied on March 6, 1950 (R. 46).

The petition for a writ of certiorari was filed on June 2, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Court of Claims erred in finding that there was no taking by the Government of any of petitioners' property.

STATEMENT

This action was brought in the names of the three petitioners as trustees of the Tampa Shipbuilding and Engineering Company,[1] a dissolved corporation. Petitioners sought the sum of $2,078,000 as just compensation for the alleged taking of the properties of the company by the United States.

On May 21, 1938, the company entered into contracts with the United States, acting through the Maritime Commission, for the construction of four vessels (R. 5). To enable it to proceed with the construction, it borrowed $1,168,000 from the Reconstruction Finance Corporation (R. 6). Of this amount $880,000 was applied in repayment of a former loan, plus interest of $88,000 accrued and unpaid thereon (R. 6). This left the company a balance of $200,000, which sum represented the participation in the loan by the First National Bank of Tampa and the Exchange National Bank of Tampa (R. 6). The loan was secured by a mort-

[1] Hereinafter referred to as the company.

gage and deed of trust, running to the Exchange National Bank of Tampa as trustee, of which Mr. George B. Howell was trust officer (R. 6). Among other provisions, the deed of trust authorized the trustee to take over the management of the company whenever such management was considered unsatisfactory by the R. F. C. (R. 6). At the same time, the company borrowed an additional $300,000 from the R. F. C., secured by a second mortgage, and also arranged for lines of credit from the steel and engine suppliers, to secure additional capital (R. 7).

On December 31, 1948, agreements supplemental to the construction contracts were entered into between the company and the Maritime Commission (R. 7). These agreements were advantageous to the company, and, most importantly, provided for more liberal progress payments by the Commission (R. 7). During the negotiations for these supplemental agreements, the Commission received, from its representatives at the company's shipyard, reports which were critical of the company's organizational set-up (R. 35). Officials of the Commission, and petitioner Ernest Kreher, president of the company, had conferences, therefore, with respect to supervisory personnel of the company (R. 8). As a result of these discussions, an organization chart of the company was prepared, and was accepted by the company, by letter of December 21, 1938, signed by Ernest Kreher, president, as "set-

ting forth a proper and necessary organization for the performance of the contracts" (R. 8). During the next month, the company employed four of the executives whose names appeared on the chart (R. 9-10).

In the summer of 1939 the Maritime Commission advertised for bids for the construction of additional vessels of the same type as those under construction by the company (R. 10). The company's bid was accepted and contracts for the construction of four additional vessels were executed November 27, 1939 (R. 10-11). On November 21, 1939, however, the chairman of the Maritime Commission had written the company that its organizational set-up was unsatisfactory to the Commission, that a capable person, satisfactory to the Commission, should be selected as general manager of the company, and that the contracts would be executed with the understanding that the company would appoint such a person (R. 10-11). The company endorsed its acceptance of the requirement upon a copy of the Commission's letter and returned it with such endorsement to the Commission (R. 11). Thus, contracts for the additional vessels all contained the proviso that "the management and operating organization of the [company] shall at all times during the period of this contract be satisfactory to the Commission" (R. 11). Shortly after the execution of the contracts the Commission, by letter of December 20, 1939, recommended

a member of its staff, one P. B. Brill, for the position of general manager, and suggested that the company make arrangements for his employment, "if he is satisfactory to the [company]" (R. 12). Subsequent to this letter, Mr. Brill was appointed by the company as general manager (R. 12-13).

In connection with these contracts, it was again necessary for the company to secure R. F. C. financing, the normal commercial channels apparently still being closed to the company. An additional loan of $900,000 was secured, therefore (R. 11). In addition to this loan, the R. F. C. had, on April 26, 1939, made an additional loan of $35,000 to the company, applicable to the construction of the first four vessels (R. 12).

Throughout the year 1940, as the company continued the construction of the eight vessels, its financial position became increasingly precarious. This was not due to anything which occurred in 1940, but was simply a continuation of events started in 1938, when the company first agreed to build vessels for the Maritime Commission (R. 13). In the case of Hull No. 33, for example, the first of the eight vessels completed, the company showed a loss of more than $320,000 (R. 13). By September 30, 1940, the company's assets [exclusive of any equity which it may have had in the ships then under construction] were $2,977,340.12, and its liabilities [exclusive of advances by the Maritime Commission of $6,548,396.57] amounted to $3,-

716,432.28 (R. 13-14). By giving the company the greatest possible credit of $345,000 for its equity in the vessels under construction, its liabilities still exceeded its assets by about $394,000 (R. 14). Moreover, the bulk of its assets was non-liquid, while most of its liabilities were current, and many creditors were making urgent demands for their money and some were threatening to sue (R. 14).

Thus, in the fall of 1940 the company was in dire financial straits. It was unable to meet the payment due in that year on the principal and interest on its R. F. C. loan, and officials of the R. F. C. had indicated to the company that they would be compelled to foreclose (R. 15, 42). The Maritime Commission was also understandably concerned with the rather hopeless plight of the company. The Commission desired to obtain the completed vessels clear of liens and claims and was also concerned about the problem of the security for the large progress payments that had been made (R. 15, 42). At this point, Mr. George Howell again entered into discussions concerning the company's financial condition and the condition of its work under the contracts, with officials of the Maritime Commission and the R. F. C. (R. 15).[2]

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[2] Mr. Howell, because of friendship for the petitioners and a desire to maintain a flourishing shipyard in Tampa, had assisted the company throughout its negotiations with these two agencies and had been largely instrumental in the securing of the various loans and working out the preliminary details in connection with the awarding of the various contracts (R. 16).

Many discussions were also had by these officials about these matters with petitioner Ernest Kreher (R. 15).

Various alternatives were considered by these agencies, to avoid default by the company, which seemed probable (R. 15). Finally, officers of the R. F. C. prevailed upon Mr. Howell to agree to assume the management of the company, contingent upon securing additional funds for the completion of the vessels without loss (R. 15).[3] Unsuccessful attempts were made to sell the entire business, and the possibilities of securing new capital for the business were explored (R. 15). A method of securing these additional funds became apparent when, during the course of these discussions with Mr. Howell, the Navy approached the Maritime Commission with the request that several of the vessels then under construction for the Commission be turned over to the Navy for conversion into naval auxiliaries (R. 21-22). Negotiations were had between the Commission and the Navy, and the following plan was agreed upon: (1) a new corporation would be formed, which would purchase the assets and assume the liabilities of the company; (2) prior to the sale, the company would give the Commission notice of default under the con-

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[3] Mr. Howell was induced to do this because of representations he had made to the R. F. C., while he was assisting the company in negotiating its various loans, that he would continue his interest in the company and its affairs until the loans were liquidated (R. 16).

tracts for the three vessels of the first group still under construction; (3) upon such default the Commission would take possession of these three uncompleted hulls and sell them to the new corporation for an amount equal to the advances which had theretofore been made by the Commission to the company; (4) the new corporation would resell these hulls to the Navy at a somewhat higher price, and would enter into contracts with the Navy for their conversion into naval auxiliaries; (5) the new corporation would agree to pay to the United States any profits which it might make on completing the vessels covered by the company's contracts with the Commission, and, if those profits did not equal $500,000, to pay the difference out of its profits on any other Government business it might receive (R. 22).

After extended negotiations with representatives of the Maritime Commission and the R. F. C., as well as with petitioner Ernest Kreher, Mr. Howell addressed to those two agencies, under date of October 29, 1940, a letter in which he agreed to undertake a reorganization of the company on substantially the terms outlined above (R. 16-21). This letter was presented to a special meeting of the stockholders of the company, held in Tampa on November 9, 1940 (R. 23). At this meeting, at which holders of 5,720 shares out of the 7,153 shares outstanding were present in person or by proxy, Mr. Howell's letter was read and discussed

extensively (R. 23, 45). The following resolution was then unanimously adopted (R. 23-24):

> *Resolved,* that the Plan of Reorganization set forth in Paragraphs Numbered 1 to 19, inclusive, of the letter to the United States Maritime Commission and Reconstruction Finance Corporation, dated October 29, 1940, * * * be and hereby is approved and adopted; subject to such changes therein as the Board of Directors of this Corporation may deem necessary or advisable; and
>
> *Further Resolved,* that this Corporation sell all of its assets of any kind or nature whatsoever, either real, personal or mixed, and tangible or intangible, including the right to use its corporate name or any modification thereof, except its corporate franchise, to Tampa Shipbuilding Company, Incorporated, in consideration of Tampa Shipbuilding Company, Incorporated, assuming all of the liabilities and obligations of the Corporations; and,
>
> *Further Resolved,* that the officers of this Corporation be, and they hereby are authorized and directed to do all acts and things and execute all papers, documents and instruments which they deem necessary or desirable to fully carry out and consummate the said Plan of Reorganization, the said sale of all assets of this Corporation to Tampa Shipbuilding Company, Incorporated, and all action approved by the stockholders at this meeting.

On November 12, 1940, the company executed a bill of sale, conveying and transferring all of its personal property to the new corporation, Tampa Shipbuilding Company, Inc., and also a warranty deed conveying its real property to the new corporation, subject to the R. F. C. mortgages upon the property (R. 24). The reorganization was actually consummated two days later, on November 14, 1940. On that day, the company wrote the Maritime Commission that it was financially unable to meet its obligations and found it impossible to perform the contracts for the three vessels of the first group under construction (R. 22). The Commission replied by letter of the same day, acknowledged the default and informed the company that it would sell the three vessels (R. 22-23).

Simultaneously, the reorganization agreement was entered into between the company and Tampa Shipbuilding Company, Inc. (R. 26-27). Article I of the agreement related the sale by the old company to the new company of all of the assets of the old company, "real, personal or mixed, tangible or intangible, of every kind and nature whatsoever except only its corporate franchise", while Article 3 set forth the assumption by the new company of the indebtedness and other obligations of the old company (R. 27). Article 2 of the agreement, and the supporting schedules, set forth "a proper allocation of the assets of the company as compared to the liabilities assumed" in consideration of such

acquisition, as set forth in paragraph 5(ii) of Mr. Howell's letter of October 29, as it had been approved at the meeting of the stockholders of the old company on November 9, 1940 (R. 27-31).

The reorganization was thereafter completed according to plan. The Maritime Commission sold the three vessels to the new corporation for the amount of the advances theretofore made on the purchase price, and the new corporation resold them to the Navy (R. 31). The amount of such advances was $4,613,247.67 (R. 27), and the amount paid by the Navy was $5,513,248.00 (R. 31). In addition, the Navy entered into a contract with the new corporation for the completion of these three vessels for the aggregate amount of $1,026,-752.00 (R. 31). It assumed the obligation of the old company to complete the four vessels of the second group at the prices and on the terms originally agreed upon (R. 28, 32). All the stock of the new corporation was issued in Mr. Howell's name, and was pledged by him as security for loans made by the R. F. C. (R. 32). No profits were made by the corporation on the completion of the vessels (R. 32). Some profit was made on Navy contracts for reconversion of other vessels (R. 32).

Because of the advent of the war, the new company secured additional contracts for the construction and conversion of ships, and did earn profits on this business (R. 32). These profits enabled it to pay off the debts of the old company, which it

had assumed, thereby securing the release of the new company's stock from the pledge agreement (R. 31, 32). When this was done, one share of non-voting stock was given to each stockholder of the old company for each two shares he had previously held, some shares of voting stock were distributed to key employees of the new company, and the balance were retained by Mr. Howell (R. 31). Dividends were thereafter paid on this stock out of earnings, aggregating about 20 per cent of the par value (R. 32).

Late in 1945 a private syndicate made an offer to Mr. Howell to purchase his voting stock in the new company (R. 32). He refused to sell unless the offer was also made to the other stockholders for the purchase of their stock, and $100 a share was offered for the non-voting stock and $200 a share for the voting stock. This offer was accepted by practically all stockholders (R. 32).

The old company was dissolved on June 1, 1945, for non-payment of its franchise taxes, and its directors became trustees thereof (R. 4-5). Three of the six directors joined as trustees in the present action in suing the United States for $2,078,000 in the Court of Claims. Though a fair reading of the amended petition (R. 1-3) raises serious doubts as to just what cause of action petitioners are attempting to assert or what acts of confiscation petitioners rely on, the court below states that petitioners' claim "is, in substance, that the defendant's

preparation of the organization chart and its suggestions, as shown in the findings, of the men who should be appointed to the positions shown thereon, amounted to the taking over by defendant of complete control of the business of the corporation; and that the action of the officials of the Maritime Commission and the Reconstruction Finance Corporation, in prevailing upon George B. Howell to form a new corporation to take over the properties of the old company and forcing the officers and stockholders of the old company to agree to such plan, constituted a taking by the Government under the Fifth Amendment, of the entire properties of the Tampa Shipbuilding and Engineering Company" (R. 43). The Court of Claims, finding that there was "no merit in any of these contentions", dismissed the case (R. 43, 46).

ARGUMENT

1. Petitioners, in their argument to this Court, have apparently abandoned the groundless contention, advanced in the court below, for damages for alleged unlawful interference in the business and affairs of the company in 1939 and 1940. Instead, petitioners here rely on an alleged taking by the Government in the fall of 1940 of the assets and business of the company. Petitioners, as the crux of the argument, assert (Pet. 2): "The taking by the Government was accomplished by allowing and directing its representatives, trustee and em-

ployees, who paid neither a cent nor invested a nickel therein, to organize and operate for the benefit of the United States a corporation known as the Tampa Shipbuilding Company, a corporation." Even if this statement were true, petitioners have not asserted a claim against the United States. Nothing could be better settled in the field of eminent domain than that property is taken in the constitutional sense only when the defendant has deprived the owner of the title or use of his property without his consent. *United States* v. *Sponenbarger,* 308 U. S. 256; *Montana Co.* v. *St. Louis Mining and Milling Co.,* 152 U. S. 160, 169; *Kellettville Gas Co.* v. *United States,* 56 F. Supp. 919 (W.D. Pa.). Here, no property was vested in the United States and no orders or regulations were ever issued vesting the assets of the company in the Government. The Government, as the court below observed, "acquired no benefit from the sale to the new company except the indirect benefit of having the ships completed free of claims, at about the time the old company had originally agreed to deliver them, without the expense and delay incident to bankruptcy, receivership, or foreclosure proceedings" (R. 45). Moreover, the plan of reorganization whereby the property of the old company was sold to a new, a private corporation, was approved by the stockholders and officers of the old company (R. 45).

It is equally well settled that there can be no recovery against the United States as for the taking of property absent a showing of definitive acts by the Government to appropriate such property and absent a showing of governmental intent to so take. *Mitchell* v. *United States,* 267 U. S. 341; *Willink* v. *United States,* 240 U. S. 572; *Goodman* v. *United States,* 28 F. Supp. 497 (S.D. Iowa), affirmed, 113 F. 2d 914 (C.A. 8). Certainly, in this case, there have been no such showings of definitive steps or intent on the part of the Government to appropriate the company as a going concern. The record discloses the sale of the old company to a privately owned corporation in consideration of the assumption of the old company's very substantial debts and liabilities.

Even if it could be argued that the reorganization plan constituted a taking by the Government, the United States would not be liable for compensation since, due to the hopelessly insolvent condition of the company, nothing of value would have been taken. See *Marion and Rye Valley Ry.* v. *United States,* 270 U. S. 280; *Roberts* v. *New York City,* 295 U. S. 264. The claims asserted by petitioners as elements of value of the property allegedly taken are completely devoid of merit. Although they sought recovery of $2,078,000 in the Court of Claims (R. 3), petitioners, in their petition to this Court, seek the sum of $957,278.94 plus $423,031.52 ($1,380,310.46) or, in the alternative, $1,280,000 (Pet.

7). Petitioners assert that the sum of $957,278.94 represents the excess of assets over liabilities of the company at the time of the alleged taking (Pet. 7). This claim approaches the frivolous for by their own account (Pet. 7), petitioners blandly admit that in arriving at this figure they did not include the indebtedness of the company on the seven hulls under construction—an amount in excess of one and a third million dollars (R. 27). Petitioners claim the amount of $423,031.52 as the profits earned by the new company in completing the seven vessels it acquired (Pet. 7). It is thoroughly well established, however, that loss of profits are noncompensable (*Mitchell* v. *United States,* 267 U. S. 341; *Joslin Manufacturing Co.* v. *Providence,* 262 U. S. 668)—and especially so in this case, where the profits were derived, not under the company's contracts, but under new contracts which the new company entered into with the Navy (R. 32). In the alternative, petitioners claim that they should be paid the sum of $1,280,000, the amount realized by the Class B stockholders upon the sale of the stock of the new corporation in 1945 (Pet. 7). Petitioners allege that this sum "represented the value of the property, in part, after the Navy had completed its ship contracts and World War II came to an end" (Pet. 7). Thus, petitioners admit that this figure does not represent any value the company might have had at the time of reorganization. It is established law, however, that damages

of compensation are evaluated as of the time of the alleged taking. *West* v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662; *Olson* v. *United States*, 292 U. S. 246. In any event, the money received from the sale of this stock was not received by the Government, but by the Class B stockholders of the new company.

2. Aside from the total absence of merit in petitioners' case, it should be noted that petitioners lack standing to prosecute the action at all, and the Court of Claims so found (R. 43). When the old company was dissolved, the assets of the company, including any claim which it might have against the United States, vested in six joint trustees. In such a case, the universally accepted rule is that the powers and authority of the co-trustees are equal and undivided. They must act as a unit and where one or more of the co-trustees refuses to join in a proposed action, the others cannot proceed without him, but must make application to the court having jurisdiction over the administration of the trust, for instructions as to the proper action to be taken. *Bagnell* v. *Ives*, 184 Fed. 466 (C.C. M.D. Pa.); *Irwin* v. *Larson*, 94 F. 2d 187 (C.A. 5). There is nothing in the Florida statutes dealing with the administration of the affairs of a dissolved corporation which would permit any deviation from this basic rule in the administration of trusts. Only three of the six director-trustees, however.

joined in the bringing of their suit. Accordingly, the court below, and we submit rightly so, held that the case should be dismissed for lack of authority in three of the six trustees to prosecute the case under Florida law (R. 43).

CONCLUSION

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

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JULY 1950.

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